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Re Zaharulnuddin bin Harun; ex p Hong Leong Finance Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D5-29-400 OF 1998
STEVE SHIM J
B 16 FEBRUARY 2000

Civil Procedure *— Locus Standi — Lawyer an undischarged bankrupt — Sanction from Official Assignee not obtained — Whether appointed as arbitrator to parties in dispute — Bankruptcy Act 1967 s 86 — Legal Profession Act 1976 s 38(1)(f)*

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Legal Profession *— Practice of law — Right of audience — Lawyer an undischarged bankrupt — Sanction from Official Assignee not obtained — Whether appointed as arbitrator to parties in dispute — Bankruptcy Act 1967 s 86 — Legal Profession Act 1976 s 38(1)(f)*

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The judgment debtor ('JD') filed a summon-in-chambers (encl 18) to set aside the bankruptcy notice dated 23 February 1998 issued on the request of the judgment creditor ('JC'). When the application came up for hearing before the senior assistant registrar ('the SAR'), Mr HS Sekhon was appearing for the JD. Mr HS Sekhon, a lawyer, was not qualified to practise as an advocate and solicitor under the Legal Profession Act 1976. Counsel for the JC objected to his locus standi.

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The SAR sustained the objection and dismissed the application and hence this appeal. Mr HS Sekhon admitted that he was an undischarged bankrupt and that upon being appointed by the JD and another as an arbitrator, he had written to the Official Assignee seeking his sanction. As there was no reply from the Official Assignee, he applied to invoke s 86 of the Bankruptcy Act 1967 to seek an order

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to reverse the act of the Official Assignee to make certain declaratory orders. Mr HS Sekhon has also relied on s 38(1)(f) of the Legal Profession Act 1976 as providing him the locus standi to act for the JD as he alleged that he was the arbitrator in the dispute.

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Held, dismissing the appeal:

(1) Section 86 of the Bankruptcy Act 1967 envisages a situation where an act or decision has been made by the Official Assignee and which the court, upon application, may confirm, reverse or modify. The Official Assignee had not done any act or made any

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decision regarding the request by Mr HS Sekhon for a sanction certificate. Therefore the question of the court confirming, reversing or modifying the act or decision of the Official Assignee does not arise and therefore s 86 Bankruptcy Act 1967 is clearly inapplicable (see p 639D–E).

(2) In order for s 38(1)(f) of the Legal Profession Act 1976 to apply,

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it must be shown that the arbitrator is one who is appointed by the parties to the dispute. The arbitration agreement relied on by Mr HS Sekhon was one executed between himself, the JD and a

third party. The JC was not involved at all. In the circumstances, it cannot be said that Mr HS Sekhon had been appointed an arbitrator by the parties in dispute (see p 640C–D, F).

[Bahasa Malaysia summary

Penghutang penghakiman telah memfailkan saman-dalam-kamar (lamp 18) untuk mengetepikan notis kebankrapan bertarikh 23 Februari 1998 yang dikeluarkan di atas permintaan pemiutang penghakiman. Apabila permohonan tersebut tiba untuk perbicaraan di hadapan penolong kanan pendaftar ('PKP'), En HS Sekhon telah hadir bagi pihak penghutang penghakiman. Encik HS Sekhon, seorang peguam, tidak layak untuk mengamal sebagai peguambela dan peguamcara di bawah Akta Profesion Guaman 1976. Peguam untuk pemiutang penghakiman membantah locus standinya. PKP menerima bantahan tersebut dan menolak permohonan tersebut dan rayuan dibuat. Encik HS Sekhon mengaku bahawa beliau adalah seorang muflis yang belum mendapat pelepasan dan bahawa selepas dilantik oleh penghutang penghakiman dan seorang lagi sebagai penimbangtara, beliau telah menulis kepada Pegawai Pemegang Harta meminta kebenarannya. Oleh kerana tiada balasan daripada Pegawai Pemegang Harta, beliau memohon untuk membangkitkan s 86 Akta Kebankrapan 1967 untuk memohon suatu perintah agar Pegawai Pemegang Harta bertindak untuk membuat beberapa perintah perisytiharaan tertentu. Encik HS Sekhon juga telah bergantung kepada s 38(1)(f) Akta Profesion Guaman 1976 sebagai memberikannya locus standi untuk bertindak bagi penghutang penghakiman kerana beliau mengatakan bahawa beliau adalah penimbangtara di dalam pertikaian tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 86 Akta Kebankrapan 1967 meliputi suatu keadaan di mana suatu tindakan atau keputusan telah dibuat oleh Pegawai Pemegang Harta dan di mana mahkamah, di atas permohonan, boleh mengesahkan, mengakaskan atau mengubahkannya. Pegawai Pemegang Harta tidak membuat sebarang tindakan atau keputusan berkenaan dengan permintaan En HS Sekhon untuk sijil kebenaran. Oleh itu, persoalan mahkamah mengesahkan, mengakaskan atau mengubah tindakan atau keputusan Pegawai Pemegang Harta tidak timbul dan oleh itu s 86 Akta Kebankrapan 1967 dengan jelas tidak terpakai (lihat ms 639D–E).

(2) Bagi memakai s 38(1)(f) Akta Profesion Guaman 1976, mestilah ditunjukkan bahawa penimbangtara telah dilantik oleh pihak-pihak kepada pertikaian. Perjanjian penimbangtara yang digantung harap oleh En HS Sekhon telah dilaksanakan oleh beliau, penghutang penghakiman dan pihak ketiga. Pemiutang penghakiman tidak terlibat langsung. Di dalam keadaan-keadaan

tersebut, tidak boleh dikatakan bahawa En HS Sekhon telah dilantik sebagai penimbangtara oleh pihak-pihak kepada pertikaian (lihat ms 640C–D, F).]

Notes

For cases on locus standi generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3083–3118.

For cases on right of audience, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1661–1671.

Cases referred to

Piper Double Glazing Ltd v DC Contracts [1994] 1 All ER 177 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 38(1)(a), 86
Legal Profession Act 1976 ss 3, 36(1), 37(1)(a), (b), 38(1)(f)
Solicitors Act 1974 s 25(1) [UK]

Hardial Singh Sekhon (Arbitrator) for the judgment debtor.
AC Chong (*Abdullah A Rahman & Co*) for the judgment creditor.

Steve Shim J: This is an appeal by Zaharulnuddin bin Harun, the judgment debtor ('JD') against the decision of the learned senior assistant registrar ('SAR') given on 13 September 1999 dismissing his application at encl 18 to set aside the bankruptcy notice dated 23 February 1998.

At the outset, I think it appropriate to note briefly the factual circumstances to the application at encl 18 and this appeal. It seems that Mr Hardial Singh Sekhon ('Mr HS Sekhon') had been appointed an arbitrator under an arbitration agreement executed between himself, Zaharulnuddin bin Harun ('JD') as well as one Adzzahari bin Sudin. He apparently conducted the arbitration proceedings relating to disputes between Zaharulnuddin bin Harun as the applicant and Adzzahari bin Sudin as the respondent and came out with an interim award. Thereafter, presumably arising out of what was stated in the said interim award, the JD filed a summon in chambers at encl 18 applying to set aside the bankruptcy notice dated 23 February 1998 issued out on the request of the judgment creditor ('JC'). The application at encl 18 was supported by the affidavit of the JD as well as the affidavit of Mr HS Sekhon. The record shows that when the said application came up for hearing before the SAR, Mr HS Sekhon was appearing for the JD. At the time, Mr HS Sekhon, although a lawyer, did not have a valid practising certificate and so was not qualified to practise as an advocate and solicitor in Malaysia under the Legal Profession Act. Not surprisingly therefore counsel for the JC objected to his locus standi. After hearing submissions, the SAR sustained the objection and thereafter dismissed the said application. Hence this appeal before me.

Clearly the only issue in this appeal concerns the locus standi of Mr HS Sekhon. Mr HS Sekhon has launched into a lengthy submission citing both foreign and local case authorities in an endeavour to convince this court that he had the locus standi to act for and on behalf of the JD in the proceedings before the SAR.

Central to his case is his contention that he was acting for the JD as a arbitrator advocate and not a solicitor and advocate within the meaning provided by s 3 of the Legal Profession Act 1976 which states:

> 'advocate and solicitor', and 'solicitor' where the context requires means an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act; ... .

According to him, he was not acting for and on behalf of the JD in what he describes as 'a Bar Council advocate'. He contends that he is perfectly entitled in law to act as an arbitrator advocate in the instant proceedings citing in support the English case of *Piper Double Glazing Ltd v DC Contracts* [1994] 1 All ER 177 drawing particular attention to the headnote therein which states:

> Where a party is represented in an arbitration by a person who is not qualified as a barrister or solicitor, but who provides similar services, and an award is made providing for payment of that party's cost by the other party or for such costs to be taxed in the High Court if not agreed, the court has power under RSC O 62 r 2(2) to allow the costs of the unqualified person in relation to the conduct of the arbitration. The prohibition in s 25(1) of the Solicitors Act 1974 against the recovery of costs in respect of anything done by any unqualified person 'acting as a solicitor' does not apply to an unqualified person representing a party in an arbitration since an unqualified person does not 'act as a solicitor' within the meaning of s 25(1) merely by doing acts of a kind commonly done by solicitors.

Whilst it is clear that the English case cited above dealt essentially with the construction and application of s 25(1) of the Solicitors Act 1974 in relation to costs claimed by an unqualified person in conducting an arbitration, I am aware that Mr HS Sekhon is relying on it as establishing what I consider to be a collateral principle that any person who is not a barrister or solicitor can also be appointed as an arbitrator advocate in an arbitration.

In the instant case, although Mr HS Sekhon has maintained that he was competent to act as arbitrator cum arbitrator advocate, he nevertheless concedes he was an undischarged bankrupt and as such, he would require a sanction certificate from the Official Assignee to act as an arbitrator or arbitrator advocate. The fact that he could as a bankrupt, be appointed as such, does not mean that he could dispense with the need to obtain the relevant sanction from the Official Assignee. That is a mandatory requirement. The sanction would be in the form of a certificate issued by the Official Assignee. Without the sanction certificate from the Official Assignee, I do not think, a bankrupt can act either as an arbitrator or as an arbitrator advocate. To act otherwise would be a clear violation of s 38(1)(a) of the Bankruptcy Act 1967 which stipulates:

A Where a bankrupt has not obtained his discharge —

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

Here, Mr HS Sekhon has admitted that he was (still is) an undischarged B bankrupt and that upon being appointed by the JD and another as an arbitrator, he then wrote to the Official Assignee seeking his sanction. He says that as there was no reply from the Official Assignee, he had therefore invoked s 86 of the Bankruptcy Act in appealing to this court by way of summons in chambers at encl 18 apparently seeking an order to reverse the act of the Official Assignee to make certain declaratory orders.

C Now, s 86 of the Bankruptcy Act stipulates as follows:

If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the Official Assignee, we may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

D Quite obviously, the section envisages a situation where an act or decision has been made by the Official Assignee which forms the subject matter of the complaint by a bankrupt, etc, and which the court, upon application, may confirm, reverse or modify. In our case, we have a different scenario. It has been alleged that the Official Assignee had not done any act or made E any decision regarding the request by Mr HS Sekhon for a sanction certificate. Therefore the question of the court confirming, reversing or modifying the act or decision of the Official Assignee does not arise. In the circumstances, s 86 Bankruptcy Act is clearly inapplicable.

As regards his request for declaratory orders, this cannot be entertained by virtue of the provisions of s 38(1)(a) Bankruptcy Act highlighted above. F Mr HS Sekhon has not obtained the sanction of the Official Assignee to seek such orders.

Now, Mr HS Sekhon has also relied on s 38(1)(f) of the Legal Profession Act as providing him the locus standi to act for the JD and these proceedings. To appreciate the full scope and effect of the section, it is, G I think, pertinent to also take note of s 36(1) and s 37(1)(a) and (b) of the same Act which stipulate respectively as follows:

36 (1) Subject to this section, no person shall practise as an advocate and solicitor or do any act as an advocate and solicitor unless his name is on the Roll and he has a valid practising certificate authorizing him to do the act; a person who is not so qualified is in this Act referred H to as an 'unauthorized person'.

37 (1) Any unauthorized person who —

(a) acts as an advocate and solicitor or agent for any party to proceedings or in any capacity, other than as a party to an action in which he is himself a party, sues out any writ, summons or process, or commences, carries on, solicits or defends any I action, suit or other proceedings in the name of any other person in any of the courts in Malaysia or draws or prepares any instrument relating to any proceedings in any such courts; or

(b) wilfully or falsely pretends to be, or takes or uses any name, title, addition or description implying that he is duly qualified or authorized to act as an advocate and solicitor, or that he is recognized by law as so qualified or authorized,

shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand five hundred ringgit or to imprisonment for a term not exceeding six months or to both.

38 (1) Section 37 shall not apply to —

(f) any arbitrator or umpire lawfully acting under any written law relating to arbitration, settling or attempting to settle the dispute between the parties to the arbitration.

Thus the law relating to the need for anyone practising as an advocate and solicitor in Malaysia to obtain a practising certificate from the Bar Council is statutorily entrenched. In my view, the provisions under s 38(1)(f) of the Legal Profession Act are sufficiently clear. In order to fall within its ambit, it must be shown that the arbitrator is one who is appointed by the parties to the dispute.

In the present case, when the relevant affidavits filed herein and the exhibits annexed thereto are examined in totality, it is clear beyond doubt that the parties in dispute are Hong Leong Finance Bhd, the JC and Zaharulnuddin bin Harun, the JD. Certainly, the central issue concerns the bankruptcy notice dated 23 February 1998 which was effected on the application of the JC in the wake of a default judgment obtained by the JC against the JD in the Kuala Lumpur Sessions Court on 21 October 1997. Indeed, the instant proceeding relates specifically to an application by the JD to set aside the said bankruptcy notice. Here, it is not disputed that the arbitration agreement relied on by Mr HS Sekhon is one executed between himself, the JD and a third party. The JC was not involved at all. In the circumstances, it cannot be said that Mr HS Sekhon had been appointed an arbitrator by the parties in dispute. Besides, the Hire-Purchase Agreement entered into between the JC and JD does not contain any arbitration clause. Hence, the question of appointment of an arbitrator should not arise. In summary, when the factual circumstances as disclosed in the affidavits filed herein are examined closely, I have no difficulty in coming to the conclusion that any reliance by Mr HS Sekhon on s 38(1)(f) aforesaid holds no water.

For the reasons stated, I agree with the decision of the SAR in holding the Mr HS Sekhon had no locus standi before him in relation to the application at encl 18. Accordingly, I will dismiss the appeal with cost.

Appeal dismissed.

Reported by Benjamin Yong